STATE PERSONNEL BOARD, STATE OF COLORADO
Case No. 99B112

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

KENNETH VIGIL,

Complainant,

vs.

DEPARTMENT OF HIGHER EDUCATION,
UNIVERSITY OF COLORADO AT BOULDER,

Respondent.

Hearing was held on June 29 and August 31, 1999 before Administrative Law Judge Robert W. Thompson, Jr. Respondent was represented by L. Louise Romero, Senior Associate University Counsel. Complainant was represented by Carol M. Iten, Attorney at Law.

Respondent called six witnesses: Carl Jardine, Director of the Department of Student Housing; Richard Steinkoenig, Manager of the Service Building; Gretchen Long, Administrative Assistant in the Office of Sexual Harassment; H. Richard Hennessy, Assistant Director of Housing; Neil Ashby, Co-Chair of the Sexual Harassment Committee; and Maria Acosta, Custodian.

Complainant testified in his own behalf and called no other witnesses.

Per complainant's request, the witnesses were sequestered except for complainant and respondent's advisory witness, Carl

Jardine.

Admitted into evidence without objection were respondent's Exhibits 1, 3-7. 10, 17, 21 and 28. Admitted over objection were Exhibits 8, 13, 14, 15, 18, 19, 22, 23, 24 and 29. Exhibit 30 was excluded.

Complainant's Exhibits A and B were admitted without objection. Exhibit C was admitted over objection.

MATTER APPEALED

Complainant appeals the April 2, 1999 termination of his employment. For the reasons set forth below, respondent's action is affirmed.

ISSUES

1. Whether respondent's action was arbitrary, capricious or contrary to rule or law;

2. Whether complainant is entitled to an award of attorney fees and costs.

FINDINGS OF FACT

1. Complainant Kenneth Vigil began his employment with respondent University of Colorado at Boulder (UCB) as a custodian in August 1989. Subsequently, he worked as a storekeeper for about eight years until April 1998 when he transferred to the position of Utility Worker I with the Department of Student Housing. As a utility worker, he performed laundry duties. His immediate

supervisor was Mike Nelson.

2. On Wednesday, June 24, 1998 at approximately 1:30 p.m., Nelson directed complainant to deliver linen to Hallett Hall, a dormitory.

3. Maria Acosta is a custodian of longstanding at UCB. On June 24, 1998, she pushed a shopping cart into the linen room on the first floor and near the lounge of Hallett Hall, removed items and put items into the cart, then began backing out, pulling the cart in front of her with both hands. Complainant approached her from behind and wrapped his arms around her waist, touching her body. A startled Acosta turned around, saw a smiling complainant and instantly was angry and upset, shouting: "Don't you ever, ever touch me like that again. Only my husband touches me like that."

4. Acosta told complainant that she was going to report the incident to his supervisor, to which he responded that she was just trying to "get even," referring to an incident of the previous day where Acosta and another worker made mention of a smell in the room and complainant thought they were attributing the smell to him. On the morning of June 24, complainant had told Acosta's supervisor that Acosta and the other worker were talking about him in Spanish. There is no evidence that Acosta knew complainant had spoken to her supervisor.

5. Shortly after the linen room incident, Acosta saw her supervisor, Mary Garza, in the lounge and informed her of that which had just taken place. Complainant, who was close by, overheard the conversation and yelled: "This is bullshit. I wouldn't touch that shit." Acosta felt humiliated. The touching incident and these remarks upset and distressed her.

6. The two supervisors together arranged to keep complainant and Acosta apart. When complainant was about to make a delivery to Hallet Hall, complainant's supervisor would place a call to Hallet Hall so Acosta would not have to come into contact with him. Eventually, Acosta transferred to another dormitory.

7. On June 26, at the behest of her supervisor, Acosta wrote a report of the June 24 occurrence. (Exh. 24, Att. A.) The Department of Housing, headed by Carl Jardine, filed a sexual harassment complaint against complainant with the University's Office of Sexual Harassment.

8. Neil Ashby, a physics professor of 38 years at UCB, serves as co-chair of the Sexual Harassment Committee. Appointed by the Chancellor, Ashby has attended various training sessions pertaining to the investigation of sexual harassment complaints. The other co-chair was Shari Robertson, the director of the Office of Sexual Harassment.

9. On July 8, 1999, Jardine met with Ashby and Robertson to discuss the allegations against complainant stemming from the June 24 events. Ashby and Robertson were provided a copy of Acosta's written statement. As it would turn out, pending changes in respondent's sexual harassment policies resulted in a delay of the investigative proceedings.

10. The sexual harassment procedure had been suspended in May and continued in suspension until October 19. The old policy required a three-person panel to conduct the investigation. The new policy, approved in October to be effective in January 1999, called for the investigation to be conducted by the two co-chairs.

11. Ashby and Robertson first interviewed complainant on October 7, 1998, pursuant to an interim policy whereby informal inquiries were made and interviews were not tape recorded, the interviewers relying on handwritten notes, as opposed to interviews which were recorded and transcribed.

12. On January 5, 1999, Ashby and Robertson received authorization to go forward with the sexual harassment investigation. Robertson, however, dropped out of the investigation due to an anonymous letter having been sent to the Chancellor criticizing her handling of sexual harassment complaints. Ashby thus became the sole investigator.

13. Ashby re-interviewed complainant on February 9, 1999. All told, Ashby interviewed ten individuals, including complainant, Acosta and their respective supervisors. He consulted a number of documents, encompassing information on the law of sexual harassment.

14. On March 4, 1999, Ashby issued his report of the investigation. A day prior, March 3, a three-member panel reviewed and approved the report. (Exh. 24.)

15. Ashby concluded that this incident of unwanted touching of a female by a male did not technically constitute sexual harassment because the touching, though sexual in nature, was a single occurrence and by itself fell short of being so severe or pervasive as to create a hostile work environment. At the same time, he recommended that complainant be referred to the appointing authority for possible discipline based upon the touching incident and complainant's use of foul and demeaning language (the "shit" remarks), finding that the unwanted touching and the foul language

were inappropriate in the workplace. (Exh. 24.)

16. Richard Hennessy, Assistant Director of Housing and the delegated appointing authority, held a Rule 6-10 meeting with complainant on March 29, 1999. The basis of the meeting was Ashby's report.

17. In addition to the two incidents investigated by Ashby, which he accepted as accurately portrayed in the report, Hennessy determined, as did Ashby, that complainant's conduct was wrongful. In his choice of discipline, Hennessy took into account complainant's work history demonstrating a pattern of aggressive behavior and inappropriate language in the workplace. Since December 1994, complainant had received three corrective actions, two disciplinary actions and numerous negative comments on his performance appraisals pertaining to unacceptable workplace behavior and rhetoric, the most recent discipline being a June 27, 1997 30-day suspension without pay (negotiated to two weeks) for aggressive behavior and unacceptable language directed at a supervisor. (*See* Exhs. 1, 3, 4, 5, 6, 7, 9, 10, 13, 17, 18, 19, 21, 22 and 23.)

18. The appointing authority terminated the employment of complainant Kenneth Vigil on April 2, 1999. (Exh. 28.)

DISCUSSION

In this *de novo* disciplinary proceeding, the burden is on the agency to prove by preponderant evidence that the acts or omissions on which the discipline was based occurred and that just cause warranted the discipline imposed. *Department of Institutions v. Kinchen*, 886 P.2d 700 (Colo. 1994). The Board may reverse

respondent's decision only if the action is found arbitrary, capricious or contrary to rule or law. § 24-50-103(6), C.R.S. The credibility of the witnesses and the weight to be given their testimony are within the province of the administrative law judge. *Charnes v. Lobato*, 743 P.2d 27 (Colo. 1987). It is for the administrative law judge, as the trier of fact, to determine the persuasive effect of the evidence and whether the burden of proof has been satisfied. *Metro Moving and Storage Co. v. Gussert*, 914 P. 2d 411 (Colo. App. 1995).

Respondent calls this a "classic case of progressive discipline," pointing out that complainant's dismissal was the sixth in a series of corrective and disciplinary actions over a period of four and one-half years, all of which had to do with aggressive behavior and inappropriate language in the workplace, in addition to warnings and notices via job evaluations and memos.

By contrast, complainant contends that the present matter is about the incidents of June 24, 1998 only, and prior corrective and disciplinary actions should not be considered. Complainant argues that the investigative report is flawed and the appointing authority erred in relying on it for his factual determinations. In arguing that he competently performed his duties for nine months between the subject acts and the R-6-10 meeting, complainant asserts that his conduct was not serious enough to justify termination.

I credit the testimony of witnesses Acosta, Ashby and Hennessy in concluding that the incidents of June 24, 1998, together with complainant's history of improper behavior and unacceptable language in the workplace, warrant the termination of his employment.

The appointing authority relied reasonably on the results of Ashby's investigation. He was not required to do everything all over again. The investigation was conducted thoroughly and without bias. It was appropriate for the appointing authority to consider previous offenses in reaching his termination decision. The appointing authority honestly, fairly and candidly accounted for all of the factors appearing in R-6-6, 4 Code Colo. Reg. 801, which provides:

> The decision to take corrective or disciplinary action shall be based on the nature, extent, seriousness, and effect of the act, the error or omission, type and frequency of previous unsatisfactory behavior or acts, prior corrective or disciplinary actions, period of time since a prior offense, previous performance evaluations, and mitigating circumstances. Information presented by the employee must also be considered.

This is not an instance of respondent failing to act with due diligence, as complainant contends. Steps were taken to ensure the separation of Acosta and complainant almost immediately following the June 24 events. Upon the filing of a sexual harassment complaint, it made sense to await the findings of the investigation before proceeding with disciplinary procedures. The delay, which was brought about by a change in policies and the recusal of one of the co-chairs, was neither the fault nor the responsibility of the delegated appointing authority. The investigator acted diligently once he received authorization to move forward. When Hennessy received the investigative report in March 1999, he promptly commenced the disciplinary process. The nine-month period between the wrongful conduct and the predisciplinary meeting does not reflect a lack of concern on the part of respondent. The matter was taken seriously.

Respondent did not request an award of attorney fees and

costs. *See* R-8-38(B), 4 Code Colo. Reg. 801.

CONCLUSIONS OF LAW

1. Respondent's action was not arbitrary, capricious or contrary to rule or law.

2. Complainant is not entitled to an award of fees and costs.

ORDER

The action of respondent is affirmed. Complainant's appeal is dismissed with prejudice.

DATED this _____ day of September, 1999, at Denver, Colorado.

_____
Robert W. Thompson, Jr.
Administrative Law Judge

NOTICE OF APPEAL RIGHTS

EACH PARTY HAS THE FOLLOWING RIGHTS

1. To abide by the decision of the Administrative Law Judge ("ALJ").

2. To appeal the decision of the ALJ to the State Personnel Board ("Board"). To appeal the decision of the ALJ, a party must file a designation of record with the Board within twenty (20) calendar days of the date the decision of the ALJ is mailed to the parties. Section 24-4-105(15), C.R.S. Additionally, a written notice of appeal must be filed with the State Personnel Board within thirty (30) calendar days after the decision of the ALJ is mailed to the parties. The notice of appeal must be received by the Board no later than the thirty (30) calendar day deadline. Vendetti v. University of Southern Colorado, 793 P.2d 657 (Colo. App. 1990); Sections 24-4-105(14) and (15), C.R.S.; Rule R-8-58, 4 Code of Colo. Reg. 801. If a written notice of appeal is not received by the Board within thirty calendar days of the mailing date of the decision of the ALJ, then the decision of the ALJ automatically becomes final. Vendetti v. University of Southern Colorado, 793 P.2d 657 (Colo. App. 1990).

PETITION FOR RECONSIDERATION

A petition for reconsideration of the decision of the ALJ may be filed within 5 calendar days after receipt of the decision of the ALJ. The petition for reconsideration must allege an oversight or misapprehension by the ALJ. The filing of a petition for reconsideration does not extend the thirty calendar day deadline, described above, for filing a notice of appeal of the decision of the ALJ.

RECORD ON APPEAL

The party appealing the decision of the ALJ must pay the cost to

prepare the record on appeal. The fee to prepare the record on appeal is **$50.00** (exclusive of any transcription cost). Payment of the preparation fee may be made either by check or, in the case of a governmental entity, documentary proof that actual payment already has been made to the Board through COFRS.

Any party wishing to have a transcript made part of the record is responsible for having the transcript prepared. To be certified as part of the record, an original transcript must be prepared by a disinterested, recognized transcriber and filed with the Board within 45 days of the date of the designation of record. For additional information contact the State Personnel Board office at (303) 894-2136.

BRIEFS ON APPEAL

The opening brief of the appellant must be filed with the Board and mailed to the appellee within twenty calendar days after the date the Certificate of Record of Hearing Proceedings is mailed to the parties by the Board. The answer brief of the appellee must be filed with the Board and mailed to the appellant within 10 calendar days after the appellee receives the appellant's opening brief. An original and 7 copies of each brief must be filed with the Board. A brief cannot exceed 10 pages in length unless the Board orders otherwise. Briefs must be double spaced and on 8 ½ inch by 11 inch paper only. Rule R-8-64, 4 CCR 801.

ORAL ARGUMENT ON APPEAL

A request for oral argument must be filed with the Board on or before the date a party's brief is due. Rule R-8-66, 4 CCR 801. Requests for oral argument are seldom granted.

CERTIFICATE OF MAILING

This is to certify that on the ____ day of September, 1999, I placed true copies of the foregoing **INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE** in the United States mail, postage prepaid, addressed as follows:

Carol M. Iten
Attorney at Law
3333 Quebec Street, Suite 4100
Denver, CO 80207

and in the interagency mail, addressed as follows:

L. Louise Romero
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